IN THE SUPREME COURT
OF THE STATE OF CALIFORNIA

Case No. S242799

JULIA C. MEZA,

Plaintiff -Petitioner,

v.

PORTFOLIO RECOVERY ASSOCIATES, LLC, HUNT & HENRIQUES, MICHAEL SCOTT HUNT, JANALIE ANN HENRIQUES, and ANTHONY J. DIPIERO,

Defendants-Respondents.

RESPONDENTS' ANSWER BRIEF ON THE MERITS

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CERTIFICATION OF INTERESTED ENTITIES OR PERSONS

Respondent Portfolio Recovery Associates, LLC is a Delaware limited liability company and is a wholly-owned subsidiary of PRA Group, Inc., a publicly-traded Delaware corporation. PRA Group, Inc. is listed on the NASDAQ stock exchange under the symbol PRAA. Respondent Hunt & Henriques is a law firm. The remaining Respondents, Michael Scott Hunt, Janalie Ann Henriques, and Anthony DiPiero, are individual persons.

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I. INTRODUCTION

Petitioner Julia C. Meza ("Meza") – through her counsel – appears to have lost track of the narrow legal issue to be addressed here. She devotes much of her opening brief to launching a full-scale attack on the accounts receivable industry, accusing it of "prey[ing] on a vulnerable Court system in the same way it preys on vulnerable consumers . . . by exploiting a perceived loophole in California Code of Civil Procedure § 98."[1] Meza also takes aim at the entire California court system – which she refers to as "part of the collection arm of the debt buying industry"[2] – implying that it is financially dependent on the industry and thus complicit in the industry's supposed abuses. She questions whether "the court system should contort its rules to satisfy the business model of the debt buying industry."

Meza faults debt buyers for filing a lot of lawsuits.[3] Litigation, however, is the last option available when other efforts to help consumers address their unpaid financial obligations fail. Meza suggests that the First Amendment does not "guarantee a right to use the courts for collection of defaulted consumer debt,"[4]

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[1] Petitioner's Opening Brief ("POB"), at 10-11.

[2] POB at 10.

[3] Meza's generalized attack on debt buyers is devoid of any evidence supporting her various assertions.

[4] POB at 35.

but she is wrong. It does.

Debt buyers–like all litigants–have an absolute right to petition the government for redress by filing lawsuits. When defendants do not respond to those suits, debt buyers–like all litigants–have an absolute right to seek a default judgment. And when consumers respond and "exercise their right to demand that debt buyers provide proof of the validity and amount of the debt, and litigate cases to trial,"[5] debt buyers–like all litigants–have an absolute right to utilize the procedures enacted by the Legislature – including section 98 – to prosecute or defend lawsuits. Section 98 is available to all litigants, whether they are a party to a single lawsuit or multiple lawsuits. Respondents Portfolio Recovery Associates, LLC ("PRA"), Hunt & Henriques, Michael Scott Hunt, Janalie Ann Henriques and Anthony DiPiero (collectively, "Respondents") properly invoked and complied with the requirements of section 98 in the suit against Meza, and even if they had *improperly* invoked it, litigation activity cannot constitute a statutory tort.

This Court must ascertain the plain meaning of section 98 of the California Code of Civil Procedure. This is a procedural device designed to reduce the costs associated with litigating small stakes cases. It was enacted to give all litigants in limited jurisdiction cases the option to present trial testimony by way of affidavit,

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[5] POB at 10.

thereby avoiding the cost of sending a live witness to trial. To preserve the right of cross-examination, however, the section 98 declaration must specify an address within 150 miles of the courthouse where the declarant is "available for service of process" for a reasonable period of time during the twenty days prior to trial.

Colby Eyre, PRA's declarant here, **was** available for service of process as required by the statute. Meza admittedly made no attempt to serve process on him. Had she done so, it is undisputed that the attorneys at Hunt & Henriques would have accepted service for him, thereby preserving her right to cross-examine him. Meza, however, had no interest in examining Mr. Eyre. Her interest was in seizing on Respondents' alleged failure to comply with section 98 in the hopes of filing a Fair Debt Collection Practices Act ("FDCPA")[6] class action claim.

Meza's argument is built on a series of assumptions, all of which the Court must accept in order for her to succeed. If any one of her assumptions fails, her entire argument collapses.

First, this Court has to accept her theory that section 98 "must contemplate" that the declarant be available to be served personally with a *subpoena*. Doing so, however, would require this Court to read into the statute words that are not there, and to re-insert language that the California Legislature rejected. This would

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[6] 15 U.S.C. §§ 1692, *et seq.*

ignore the Court's clear and oft-repeated instructions concerning statutory interpretation.[7] As first introduced, section 98 would have required the declarant to be available for service of a subpoena. Before it was enacted, however, the Legislature removed the word "subpoena." Meza wants this Court put back into the statute words the Legislature expressly rejected. This would defy the Legislature's unmistakable intent and violate this Court's prior holdings.

Next, the Court would need to agree with Meza that a section 98 declarant must work or reside within 150 miles of the courthouse where trial will be held. Section 98 says no such thing. Words such as "work," "office," "reside," "live," "residence," "home," or the like appear nowhere in the statute. There is nothing suggesting that the Legislature wanted to impose such a strict limits on the work or residence addresses of witnesses who might submit declarations.

Meza misinterprets the Legislative history and purpose of section 98. The statute was meant to reduce delay and costs in litigating small-stakes matters. Her interpretation would force parties to bear the expense of locating their witnesses within 150 miles of the courthouse during the twenty-day period before trial. This

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[7] The Appellate Divisions of two Superior Courts wrongly embraced this argument. *See Target National Bank v. Rocha*, 216 Cal. App. 4th Supp. 1 (Santa Clara County Sup. Ct. App. Div. 2013); *CACH LLC v. Rodgers*, 229 Cal. App. 4th Supp. 1 (Ventura County Sup. Ct. App. Div. 2014).

would cost significantly more than sending a witness to court on the day of trial. This makes no sense and cannot have been what the Legislature intended. Meza's tortured interpretation of section 98 is contrary to the plain language of the statute and its purpose.

For these reasons, Meza's interpretation of section 98 must be rejected. Under section 98(a) of the California Code of Civil Procedure, the affiant need not be physically located and personally available for service of a subpoena at the address provided in the declaration that is within 150 miles of the place of trial. Thus, the Court should answer in the negative the question certified to it by the Ninth Circuit Court of Appeals.

II. FACTS AND PROCEDURAL HISTORY

A. Meza Defaults On Her Credit Card And Is Sued In State Court

Meza opened a credit card account with non-party Wells Fargo Bank, N.A., incurred charges on the account, and ultimately defaulted. *See* ER 38 at ¶¶ 13-14. The account was then "sold, assigned or otherwise transferred" to respondent PRA," which placed it for collection with respondent Hunt & Henriques, a law firm. That firm filed a lawsuit on behalf of PRA against Meza to collect the unpaid balance in San Mateo County Superior Court (the "state court action"). *See id.* 38 at ¶¶ 14-16.

B. Respondents Serve Meza With A Section 98 Declaration Inviting Her To Request The Declarant's Presence At Trial

On April 11, 2014, Hunt & Henriques served Meza with a "Declaration of Plaintiff in Lieu of Personal Testimony at Trial (CCP § 98)" ("the section 98 declaration"). *See id.* at ¶ 17, ER 47-50. The section 98 declaration included testimony relating to Meza's unpaid account, and was signed by PRA employee Colby Eyre. *See id.* 47-50. After the last paragraph, the section 98 declaration advised: "Pursuant to CCP § 98 this affiant is available for service of process: c/o Hunt & Henriques, 151 Bernal Road, Suite 8, San Jose, CA 95119 for a reasonable period of time, during the twenty days immediately prior to trial." *Id.* 49.

It is undisputed that Hunt & Henriques had a policy of accepting service of process for any section 98 declarant, regardless of how the process was delivered to the firm, including by personal service, mail, overnight courier, fax, or even email. *See id.* 193 at ¶ 6; *see also* Order Certifying Question to The California Supreme Court, at 5 (9th Cir. June 22, 2017) ("it is clear that H&H was authorized to accept service of process on Eyre's behalf") (hereafter, "Order Certifying Question"). Neither Meza nor anyone working on her behalf attempted to effect service of process on Mr. Eyre. *See id.* 154-56.[8]

C. Meza Files A Putative Class Action Lawsuit Against Respondents Asserting That They Failed To Comply With Section 98 And Thereby Violated The Fair Debt Collection Practices Act

On August 27, 2014, Meza commenced a putative class action in the United States District Court for the Northern District of California, claiming that the section 98 declaration was "invalid" under California law and thus violated the FDCPA, 15 U.S.C. §§ 1692, *et seq.* *Id.* 14-32 (Original Class Action Complaint); *see also id.* 33-51 (First Amended Class Action Complaint). On September 19, 2014, Respondent filed their Answer to Meza's First Amended Complaint. *Id.* 52-64.

Respondents moved for summary judgment on April 27, 2015. *Id.* 65-485.

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[8] The state court action was ultimately dismissed prior to trial.

Meza opposed this motion on May 26, 2015. *Id.* 486-534. Respondents filed their reply on June 5, 2015. *Id.* 535-54. On August 24, 2015, Respondents submitted supplemental authority in support of their motion. *Id.* 555-69. On September 1, 2015, the District Court granted Respondents' motion for summary judgment. *Id.* 570-86; *see Meza v. Portfolio Recovery Assocs., LLC*, 125 F. Supp. 3d 994 (N.D. Cal. 2015). Judgment was entered the same day. ER 587. Meza filed her notice of appeal on September 23, 2015. *Id.* 588-89. After entertaining oral argument, the United States Court of Appeals for the Ninth Circuit certified to this Court the following question:

> Under § 98(a) of the California Code of Civil Procedure, must the affiant[9] be physically located and personally available for service of process at the address provided in the declaration that is within 150 miles of the place of trial?

Order Certifying Question at 4.

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[9] "'Affiant' and 'declarant' are used interchangeably throughout the certification order."

III. ARGUMENT

A. This Court Examines The Language Of Section 98 To Determine The Legislature's Intent And Effectuate The Statute's Purpose

"In construing a statute," this Court's "task is to determine the Legislature's intent and purpose for the enactment." *People v. Yartz*, 37 Cal. 4th 529, 537 (2005); *accord MacIsaac v. Waste Mgmt. Collection and Recycling, Inc.*, 134 Cal. App. 4th 1076, 1082, 1084 (2005) (court's "'primary task is to determine the lawmakers' intent,'" in order "'to *effectuate the purpose* of the law'" (emphasis in original). The Court must only construe, and cannot amend, the statute. *See City of Long Beach v. Workers' Compensation Appeals Bd.*, 126 Cal. App. 4th 298, 312 (2005).[10]

To determine the legislature's intent, the Court first examines the statute's plain language. *See Los Angeles County Metro. Trans. Auth'y v. Alameda Produce Market, LLC*, 52 Cal. 4th 1100, 1106-07 (2011). As this Court has emphasized, the language of the statute itself is much more indicative of the Legislature's intent than other sources, because the statute's words receive much

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[10] This admonition has been codified: "In the construction of a statute or instrument, the office of the Judge is simply to ascertain and declare what is in terms or in substance contained therein, not to insert what has been omitted, or to omit what has been inserted; and where there are several provisions or particulars, such a construction is, if possible, to be adopted as will give effect to all." Cal. Code Civ. P. § 1858.

more scrutiny than the legislative history. *See Wasatch Prop. Mgmt. v. Degrate*, 35 Cal. 4th 1111, 1118 (2005) ("We examine the language first, as it the language of the statute itself that has 'successfully braved the legislative gauntlet.'" (citation omitted)). "'It is that [statutory] language which has been lobbied for, lobbied against, studied, proposed, drafted, restudied, redrafted, voted on in committee, amended, reamended, analyzed, reanalyzed, voted on by two houses of the Legislature, sent to a conference committee, and, afer perhaps more lobbying, debate and analysis, finally signed 'into law' by the Governor.'" *Id.* (internal quotation marks and citation omitted).

Accordingly, before considering other sources, the Court must first examine "the words of the statute themselves," as they are "the most reliable indicator of [the Legislature's] intent." *MacIsaac*, 134 Cal. App. 4th at 1082. The words of the statute must be given a "'plain and commonsense meaning,'" absent any specially-ascribed meaning in the statute itself. *Id.* at 1083.

If the language "is clear and unambiguous, [the court's] task is at an end, for there is no need for judicial construction. . . . In such a case, there is nothing for the court to interpret or construe." *Id.*; *see also Yartz*, 37 Cal. 4th at 538 ("If there is no ambiguity in the statutory language, its plain meaning controls; we presume the Legislature meant what it said."). The Court must also construe "the language

of a specific section . . . in the context of the larger statutory scheme of which it is a part." *Olmstead v. Arthur J. Gallagher & Co.*, 32 Cal. 4th 804, 811 (2004).

B. Section 98 Is Clear And Unambiguous; It Does Not Require Service Of A Subpoena

Here, the Court need not consider the legislative history, because the statute is unambiguous. A statute is ambiguous if it can be construed in two ways, both of which are reasonable. *See Snukal v. Flightways Mfg., Inc.*, 23 Cal. 4th 754, 778 (2000). Section 98 has only one reasonable interpretation.

Meza contends that the use of declarations "where the declarant is located more than 150 miles from the place of trial" violates section 98 of the California Code of the Civil Procedure and thus violates the FDCPA. *See* ER 45 at ¶ 55. She urges the Court to follow the rulings in *Target National Bank v. Rocha*, 216 Cal. App. 4th Supp. 1 (Santa Clara County Sup. Ct. App. Div. 2013) ("*Rocha*"), and *CACH LLC v. Rodgers*, 229 Cal. App. 4th Supp. 1 (Ventura County Sup. Ct. App. Div. 2014) ("*Rodgers*"). POB at 21. *Rocha* and *Rodgers* were wrongly decided,[11] however, and are distinguishable (as discussed in section III.E, below), and ignore

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[11] The District Court predicted this Court would not agree with the *Rocha* and *Rodgers* courts. *Meza*, 125 F. Supp. 3d at 1005 ("this Court finds that the California Supreme Court would not follow the holdings of *Rodgers* and *Rocha* requiring declarants to be physically located at the provided address in order to comply with Section 98").

the plain and unambiguous language of section 98(a), which requires the proponent of the declaration to establish that:

> A copy has been served on the party against whom it is offered at least 30 days prior to the trial, together with a current address of the affiant that is within 150 miles of the place of trial, and the affiant is available for service of process at that place for a reasonable period of time, during the 20 days immediately prior to trial.

Cal. Code Civ. P. § 98(a).

Meza points out that section 98 is "a statutory exception to the general rule of Cal. Evidence Code § 1200, which provides that declarations are inadmissible at trial," and that "[u]nless subject to a statutory exception," the section 98 declaration at issue here "is pure hearsay and would have been inadmissible at a trial over Meza's objection." POB at 20-21; *see id.* at 29-30 ("The Court's analysis should begin with the threshold proposition that live testimony of witnesses in the courtroom at trial is the preferred method of receiving evidence. [citations omitted]"). The Legislature effectively abrogated section 1200 by enacting the exception set forth in section 98 for cases where the stakes are low (as explained further below).

Section 98 is susceptible of but one construction. It requires the proponent of the written declaration to identify "a current address . . . within 150 miles of the place of trial" where the declarant "is available for service of process" for a

reasonable period during the twenty days prior to trial. Nothing in the plain language of section 98 requires the affiant to be "physically located" at the designated address, as Meza suggests. *See* POB at 22.

Nor does the statute say the declarant must "reside[]," "maintain[] an office," or "work[]" within 150 miles of the court, or use any other similar term or phrase. *See* POB at 23. Had the Legislature wanted to impose such a requirement, it could have easily mandated that the proponent of the declaration provide "a current *residential or work* address of the affiant that is within 150 miles of the place of trial," and state that "the affiant is available for service of process at that *residential or work address* for a reasonable period of time, during the 20 days immediately prior to trial." Of course, the Legislature did not do so. It would be improper for the Court to implicitly add such terms to the statute.

Meza's argument hinges on her theory "that Section 98 must contemplate service of a trial subpoena, which could *only* be personally served on [the declarant.]" POB at 24 (italics in original); *see id.* at 25 (arguing "personal service" of a subpoena "is required"). The plain language of section 98, however, makes no reference to a "subpoena" or to "personal service." of anything.

Instead, the Legislature directed the proponent of the declaration to identify "a current address . . . within 150 miles of the place of trial" where the declarant

"is available for service of process" before trial. In other words, the declarant need only provide an address – any current address – where the declarant can be served with *process*. Section 98 does not specify or limit the type of address that must be provided. A declarant can have multiple addresses but need only provide one at which the declarant "may be served with process and is within 150 miles of the place of trial."

Nor does the statute say anything about having the affiant physically present at a single address within 150 miles of the courthouse during the twenty days before trial to allow the other party to personally serve a subpoena.[12] Because section 98 is clear and unambiguous, its plain language controls. The Court need not further interpret or construe the provision.

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[12] Even if a subpoena were required, nothing in California law indicates that a subpoena can be served only at a person's residence or work address, as Meza suggests. Rather, personal service is valid at any time or any place. *See* Cal. Code Civ. P. § 1989 (California resident may be served anywhere in state); *Lucas v. Superior Court*, 203 Cal. App. 3d 733, 737 (1988) ("a party may compel attendance of witnesses subpoenaed anywhere within this state"). Mr. Eyre is a California resident. *See* ER 552 at ¶ 3. Meza also complains that "[w]ithout the 150 mile requirement of Section 98, defendants in California courts would be unable to *compel* distant and out-of-state declarants to attend trial . . . ." POB at 32. She ignores the fact that a litigant can compel an out of state declarant to attend trial, by serving process consistent with the statute's requirements. If the witness does not attend trial, the evidence that the opposing party sought to introduce through the affidavit will be excluded.

C. The History And Purpose Of Section 98 Reveals The Legislature Did Not Intend To Require Declarants To Be Located Within 150 Miles Of The Courthouse For Twenty Days Before Trial

Even if the Court concludes section 98 is ambiguous, the history and purpose of the statute reinforces Respondents' interpretation.

With ambiguous provisions, the Court may consider "extrinsic sources, including the ostensible objects to be achieved and the legislative history." *California Highway Patrol v. Superior Court*, 135 Cal. App. 4th 488, 496 (2006). The goal is to effectuate the Legislature's "apparent intent," and promote the statute's general purpose, avoiding an interpretation that would cause absurd results. *Id.* at 496-97. If the Legislature's intent is not clear, the Court may then consider "'the purpose of the statute, the evils to be remedied, the legislative history, public policy, and the statutory scheme encompassing the statute.'" *People v. Cornett*, 53 Cal. 4th 1261, 1265 (2012) (internal quotation marks and citations omitted); *see Hale v. Southern Cal. IPA Med. Grp., Inc.*, 86 Cal. App. 4th 919, 924 (2001) (court may consider legislative history if legislative intent not clear from statute's language).

Prior versions of a bill are a cognizable form of legislative history that indicate the Legislature's intent. *See Kaufman & Broad Cmtys., Inc. v.*

Performance Plastering, Inc., 133 Cal. App. 4th 26, 32 (2005).[13] Significantly, when the Legislature rejects language in an earlier version of a statute, using different language in a later version, the court may not give credence to the rejected language. This Court has repeatedly recognized that the Legislature's rejection "of a specific provision contained in an act as originally introduced is most persuasive to the conclusion that the act should not be construed to include the omitted provision." *People v. Soto*, 51 Cal. 4th 229, 245 (2011) (internal quotation marks omitted; quoting *Rich v. State Board of Optometry*, 235 Cal. App. 2d 591, 607 (1965)); *Madrid v. Justice Court of Dinuba Judicial Dist.*, 52 Cal. App. 3d 819, 825 (1975) (same); *see Gikas v. Zolin*, 6 Cal. 4th 841, 861 (1993) (Mosk, J., dissenting) ("We cannot interpret section 13353.2 to reinsert what the Legislature has deleted," citing *Rich*, 235 Cal. App. 2d at 607).[14]

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[13] In *Kaufman*, the court set forth a thorough list of items that do and do not constitute cognizable legislative history. *See id.* at 31-39. Effectively, the Court is limited to considering only that which "'shed[s] light on the collegial view of the Legislature *as a whole*.'" *Id.* at 30 (quoted citation omitted; italics in original).

[14] *See also* Cal. Code Civ. P. § 1858 (when construing statute, court shall not insert what has been omitted); *Murphy v. Kenneth Cole Prods., Inc.*, 40 Cal. 4th 1094, 1107 (2007) (amending bill to delete penalty provisions is evidence that Senate intended to exclude provisions); *Varian Med. Sys., Inc. v. Delfino*, 35 Cal. 4th 180, 194-95 (2005) (deletion of conditional stay provision in anti-SLAPP statutes supports interpretation of statute to mandate automatic stay on appeal); *In re Mehdizadeh*, 105 Cal. App. 4th 995, 1004 n. 23 (2003) ("'[t]he rejection of a specific provision contained in an act as originally introduced is "most persuasive"

1. The Purpose Of Section 98

Section 98 was designed to reduce delay and costs in litigating small-stakes matters. It cannot logically be interpreted, as Meza proposes, to require litigants to bear the expense of locating their witnesses within 150 miles of the courthouse during the twenty-day period immediately prior to trial. This would cost far more than simply bringing a witness to the courthouse on the trial date. The Legislature could not have intended this result.

Concerned that the high cost of litigation discouraged the pursuit of claims involving relatively small amounts of money, the California Legislature authorized

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that the act should not be interpreted to include what was left out' "]; *Wilson v. City of Laguna Beach*, 6 Cal. App. 4th 543, 555 (1992) ("the rejection of a specific provision contained in an act as original introduced is 'most-persuasive' that the act should not be interpreted to include what was left out."); *Stroh v. Midway Rest. Sys., Inc.*, 180 Cal. App. 3d 1040, 1055 (1986) ("When the Legislature rejects language from a bill which was part of it when it was introduced, it should be construed according to the final version"); *Western Land Office, Inc. v. Cervantes*, 175 Cal. App. 3d 724, 741 (1985) ("As we have seen, in 1979 the Legislature considered including a rebuttable presumption in Civil Code section 1942.5, but then specifically abandoned the idea. We cannot now insert in the statute a presumption expressly rejected by the Legislature. 'To do so would not be interpreting the legislative intent but would be a gross example of judicial legislation in contravention of the legislative intent logically implied from the rejection by the Legislature of an identical provision.'"); *California Coastal Com. v. Quanta Invest. Corp.*, 113 Cal. App. 3d 579, 601 (1980) ("the deletion of the flat statement that the bill was declaratory of existing law . . . and its nonappearance in the final bill strongly signifies that no legislative concurrence could be obtained for that statement of policy.").

the Economical Litigation Project ("the ELP"). The ELP was a pilot program commenced on January 1, 1978, and conducted by the Judicial Council, in two superior and two municipal courts, to identify and test procedures aimed at reducing the litigation costs associated with small stakes cases.[15]

2. The Enactment Of Section 98

Following the completion of the ELP, separate bills were introduced in the California Senate[16] and Assembly[17] to implement the more effective procedural changes identified by the ELP. The two bills were designed to reduce delays in,

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[15] As the Chief Counsel of the Assembly Judiciary Committee later explained, the "ELP sought to reduce the cost of litigation by making procedural changes in four areas of civil practice. The project sought to: simplify pleadings and eliminate demurrers; eliminate the use of certain pretrial motions; limit discovery; and modify trial procedures." Assembly Committee on Judiciary, "Trial Court Efficiency" (1981), California Assembly, Paper 223 at 48, available at http://digitalcommons.law.ggu.edu/caldocs_assembly/223. The intent was to make litigation more cost effective so "litigants would not be forced to abandon meritorious claims or defenses." *Id.* at 115 (The California Economical Litigation Project: An Evaluative Study, Prof. John T. McDermott, Project Director, Loyola Law School, at 1 (Feb. 1981)). Various procedural changes were explored. In its April 20, 1982 "Report to the Judicial Council," the Economical Litigation Review Committee ("the ELR Committee") described potential changes to trial procedures, including limiting the use of trial evidence "to that outlined in a pretrial statement," the use of "[w]ritten witness statements . . . if certain procedures were followed," and the use of "[n]arrative testimony." ER 441 [Hon. Richard Schauer, Economical Litigation Review Committee, The Economical Litigation Project 4 (Apr. 20, 1982) ("the ELR Report")].

[16] Senate Bill No. 1820, introduced March 12, 1982.

[17] Assembly Bill No. 3170, introduced March 10, 1982.

accelerate the pace of, and lower the cost of, litigating cases with small amounts in controversy. In discussing the proposed legislation, the ELR Committee noted that some of the trial procedures "did not have a significant impact in the ELP project," but explained that because "the use of the written witness statements was successful," it was retained in the proposed legislation. ER 441.[18]

As first introduced, Assembly Bill No. 3170 proposed a new section 98 of the Code of Civil Procedure. The bill would have permitted any party to "introduce into evidence the affidavit of any witness," provided, *inter alia*, that: "A copy, together with the current address of the affiant, has been received by the party against whom it is offered at least 15 days prior to the trial, and the affiant is subject to subpena for the trial." ER 459 [Assem. B. 3170, 1981-1982, Reg. Sess. (Cal.1982) at 6 (introduced by Assemblywoman Maxine Waters, Mar. 10, 1982)].

On April 21, 1982, the quoted language in the paragraph above was amended to read as follows: "A copy, together with the current address of the affiant, has been served on the party against whom it is offered at least 30 days

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[18] Indeed, the ELR Committee described the use of witness statements as one of "the most successful features of [the] ELP." *Id.* at 444. Accordingly, the ELR Committee recommended that the Judicial Council support Assembly Bill No. 3170 and report the Committee's "findings to the Legislature to assist in its evaluation of Assembly Bill No. 3170 and other proposals aimed at reducing costs of civil litigation." *Id.* at 446.

prior to the trial, **and the affiant is available for service of process at a place designated by the proponent, within 150 miles of the place of trial**, at least 20 day prior to trial." ER 467-68 [Assem. B. 3170, 1981-1982, Reg. Sess. (Cal. 1982) (as amended, Apr. 21, 1982) (emphasis added)]. The Assembly thus rejected the language requiring the affiant be "subject to subpoena" in favor of a requirement that the affiant simply be "available for service of process."[19]

In 1982, the California Legislature passed Senate Bill 1820 and the governor signed it. Section 98 was enacted, along with a series of provisions, referred to collectively as Economic Litigation For Limited Civil Cases, found at sections 90 through 100 of the Code of Civil Procedure. The Legislature found and declared "that the costs of civil litigation have risen sharply in recent years. **This increase in litigation costs makes it more difficult to enforce smaller claims even though the claim is valid or makes it economically disadvantageous to defend against an invalid claim.**" The Legislature further found and declared that "**there is a compelling state interest in the development of pleading, pretrial and trial procedures which will reduce the expense of litigation to the litigants in cases involving less than $15,000.** Therefore the

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[19] As amended, Assembly Bill No. 3170 was subsequently incorporated into Senate Bill No. 1820, which was amended on June 18, 1982 and August 24, 1982. *See* ER 471-78. Neither amendment changed the language of section 98.

provisions of Article 2 (commencing with Section 90) are added to Chapter 5 of Title 1 of Part 1 of the Code of Civil Procedure." Section 5 of Stats. 1982, c. 1581, p. 6230 (emphasis added).

As enacted by the California Legislature in 1982, section 98(a) read as follows:

> (a) A copy, together with the current address of the affiant, has been served on the party against whom it is offered at least 30 days prior to the trial, and the affiant is available for service of process at a place designated by the proponent, within 150 miles of the place of trial, at least 20 days prior to trial.

Cal. Code Civ. P. § 98(a) (1982); ER 480-85 [Bion M. Gregory, Statutes of California and Digests of Measures 6229 (1982)]. The following year, section 98(a) was amended to read – and presently reads – as follows:

> (a) A copy has been served on the party against whom it is offered at least 30 days prior to the trial, together with a current address of the affiant that is within 150 miles of the place of trial, and the affiant is available for service of process at that place for a reasonable period of time, during the 20 days immediately prior to trial.

Cal. Code Civ. P. § 98 (1983).

If section 98 had been adopted by the Legislature as originally introduced, then section 98 affidavits would be admissible only if "[a] copy, together with the current address of the affiant, has been received by the party against whom it is offered at least 15 days prior to the trial, and the affiant is subject to subpena [sic]

for the trial." *See* ER 459. But section 98 was not adopted as originally drafted. The Legislature rejected the subpoena requirement, and the final version only required the affiant to be "available for service of process" within 150 miles of the courthouse during the 20 days before trial.

Meza does not even attempt to grapple with this key fact. Instead, she persists in arguing that the Legislature must have "contemplated" personal service of a subpoena. Why, then, did the Legislature remove the word "subpoena" from the statute? Why did it not say the affiant must be "available for *personal* service of process" when section 98 was approved and signed into law? Meza cannot answer these questions.

In a section of her brief containing the misleading title "The Legislative History of Section 98 Supports Meza's Interpretation," Meza discusses the history of a completely different section of the Code of the Code of Civil Procedure – section 1989. *See* POB at 32-34. She never once mentions the legislative history of section 98. After walking through the various incarnations of section 1989, she declares that when section 98 was enacted in 1982, "a subpoenaed witness could be required to travel anywhere in the state for their personal appearance at a trial," under section 1989. *Id.* at 33. This proves nothing, and, of course, has nothing to do with the requirements of section 98.

Meza then says that before section 98 was adopted, "affiants from anywhere in the state would have been allowed to submit their trial testimony via affidavit." *Id.* at 34. This statement is simply untrue, and Meza cites no authority to support it. Prior to the enactment of section 98, any such an affidavit would have been stricken as hearsay. It was only with the enactment of section 98 that an exception to this rule was created.[20]

Based on this faulty assumption, Meza argues that the Legislature could not have "intended to tip the 'cost saving' balance in favor of distant affiants," and instead the Legislature "must have intended to tip the 'cost saving' balance in favor of parties against whom trial affidavits would be used by requiring a party against whom a section 98 declaration is offered "to travel no more than 150 miles to serve a Subpoena requiring the personal attendance of the affiant." POB at 34 (emphasis omitted).[21] There is nothing in the legislative history of an unrelated

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[20] *See id.* at 18 ("Declarations are hearsay Evidence, but Section 98 provides an exception to this general rule."); *id.* at 20 ("This Court must interpret Section 98, a statutory exception to the general hearsay rule of Cal. Evidence Code § 1200, which provides that declarations are inadmissible at trial.").

[21] Meza's tortured argument presupposes that the litigant against whom the affidavit is offered would be traveling and serving the subpoena, as opposed to hiring a registered process server, who may charge a flat rate regardless where the witness is located. It also presupposes that the litigant serving the subpoena resides at the courthouse, and therefore would have to travel no more than 150 miles. In reality, a litigant might reside somewhere that is hundreds of miles from

provision of the Code – section 1989 – or in the history of section 98 itself to support Meza's conclusion that section 98 was meant as a compromise "between the litigation costs saved by parties" utilizing section 98 declarations "and the additional costs incurred by parties against whom such affidavits are offered in serving Subpoenas." *Id.*[22]

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the courthouse, in which case they may have to travel more than 150 miles. In truth, section 98 does not require personal service of a subpoena – or personal service of any type. It effectively eliminates the cost to the litigant against whom the declaration is offered, by enabling the party to mail, fax, or even email a notice requesting the affiant to appear at trial.

[22] According to Meza, section 98's "purpose is best served by reducing the cost of mandatory travel fees required [by statute to be paid to the declarant] to mileage for 150 miles traveled, or $30.00." POB at 23. Section 98, however, says nothing about the availability of mileage or travel fees. This argument ignores the much-greater cost savings that the Legislature sought to achieve by potentially eliminating the costs associated with requiring a witness to travel hundreds or thousands of miles to attend a low-stakes trial, while preserving the opposing party's right to cross-examine the declarant. A prevailing party is entitled to recover allowable costs, which include "[o]rdinary witness fees pursuant to Section 68093 of the Government Code." *See* Cal. Code Civ. Proc. §§ 1032(b), 1033.5(a)(7). Section 68093 sets the amount of those fees when a witness is "legally required to attend a civil action or proceeding in the superior courts" at $35 per day "for each day's actual attendance . . . and mileage actually traveled, both ways" at twenty cents per mile." Cal. Govt. Code § 68093; *see, e.g., Foothill-De Anza Comm'y College Dist. v. Emerich*, 158 Cal. App. 4th 11, 30 (2007) (witness "legally required to be present due to defendants' notice to [plaintiff] to produce him"); *City of Downey v. Gonzales*, 262 Cal. App. 2d 563, 569 (1968) ("Defendants are correct in the proposition that a witness need not appear under the coercion of a subpoena before statutory witness fees can be recovered in connection with his testimony. The fact that a witness who resided within the effective range of a subpoena appeared voluntarily did not prevent the

D. An Affiant Is "Available For Service Of Process" If He Designates An Agent To Accept Service For Him

The plain language of section 98 provides that the affiant need only be "available for service of process" at *a* current address within 150 miles of the courthouse, not that the affiant be physically stationed at that address. *See* Cal. Code Civ. P. § 98. In California, process can be served without personally serving a party. "[A]s a general rule, service of process is the means by which a court obtains personal jurisdiction over a defendant . . . ." *Stafford v. Briggs*, 444 U.S. 527, 553 n.5 (1980); *see Albers v. Rohrs*, 217 Cal. App. 4th 1199, 1206 (2013) ("Proper *service of process* of a petition or complaint is the means by which a court obtains personal jurisdiction over a party."). The essential purpose of service is to supply notice of the pendency of legal action, in manner and at a time that affords defendant a fair opportunity to answer a complaint and present defenses and objections. *See Henderson v. United States*, 517 U.S. 654, 672 (1996); *Lewis v. LeBaron*, 254 Cal. App. 2d 270, 276 (1967); *Doe v. Qi*, 349 F. Supp. 2d 1258, 1276 (N.D. Cal. 2004); *see also Gould v. Richmond Sch. Dist.*, 58

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allowance of such witness fee as costs, since when a witness was sworn and testified, he was 'legally required to attend' within the meaning of Political Code section 4300g (now Government Code, section 68093) providing for allowance of witnesses' fees"). Here, Meza never requested that Mr. Eyre appear at trial, and there is nothing in the record on whether he would be entitled to witness fees.

Cal. App. 2d 497, 508 (1943) (Peters, P.J., dissenting) ("The purpose of service is to give the district notice of the fact that the action is pending.").[23] One is "available for service of process" if there is a mechanism by which service may be accomplished, thereby giving the person notice of the legal action against her. *See Watts v. Crawford*, 10 Cal. 4th 743, 761 (1995) ("amenable to process" refers to susceptibility of defendant to being sued as opposed to his reasonable "availability for service of process," meaning whether defendant may be served under various methods provided for by statute).

California has numerous methods to accomplish service of process. One such mechanism is service upon an individual or entity appointed or designated to receive service of process. *See* Cal. Code Civ. P. §§ 416.10, 416.90. Service on an attorney or authorized agent is one effective method of service. *See id.*; *Warner Bros. Records v. Golden W. Music Sales*, 36 Cal. App. 3d 1012, 1017

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[23] "The service of writs, complaints, summonses, etc., signifies the delivering to or leaving them with the party to whom or with whom they ought to be delivered or left; and when they are so delivered, they are then said to have been served. In the pleading stage of litigation, is the delivery of the complaint to the defendant either to him personally or, in most jurisdictions, by leaving it with a responsible person at his place of residence." *Black's Law Dictionary*, 6th Ed. (1990) at 1368-69. There exist various types of service of process, such as constructive service, service pursuant to long-arm statutes, personal service, service by publication and substituted service. *See id.*

(1974); *In re Estate of Moss*, 204 Cal. App. 4th 521, 524, 530-34 (2012).[24] Service of process is routinely performed on authorized agents of domestic and nonresident corporations and partnerships. *See* Cal. Code Civ. P. §§ 416.10, 416.30 & 416.40. The same rule for service of process applies to individuals. *See Warner Bros. Records*, 36 Cal. App. 3d at 1017; *Summers*, 140 Cal. App. 4th at 411 (2006). Service of process upon an authorized agent or attorney is as valid and binding as statutory service upon the principal.[25] Because service of process may be achieved by a variety of methods that do not require personal delivery on the person served, a section 98 declarant may be "available for service of process" without being "physically located" within 150 miles of the courthouse, as Meza contends.

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[24] *See also National Equip. Rental, Ltd. v. Szukhent*, 375 U.S. 311 (1964) (agent's prompt acceptance and transmittal to defendants of summons and complaint pursuant to authorization was sufficient to validate agency); *cf. Summers v. McClanahan*, 140 Cal. App. 4th 403, 414 (2006) (service ineffective; no evidence defendant's manager was authorized to receive service of process).

[25] *See Sadruddin v. City of Newark*, 34 F. Supp. 2d 923, 926 (D.N.J. 1999) (service of process on attorney in law department of city was valid and binding service on Mayor as representative and defendant city as principal); *see also United States v. Davis,* 38 F.R.D. 424, 425-26 (N.D.N.Y.1965) (service of process on defendants' attorney effective); *Union City v. Capitol–Theatre Amusement Co.,* 26 N.J. Misc. 102, 57 A.2d 226, 228 (1948) (attorney held out as person on whom service should be made was authorized to accept service); *Purcell v. State (Bennett, Prosecutor),* 68 N.J.L. 519, 520–21, 53 A. 235 (1902) (**defendant's attorney is presumed to be authorized agent upon whom service is binding**).

In this case, Mr. Eyre appointed the attorneys at Hunt & Henriques to accept service of process on his behalf, as evidenced by his declaration. Had Meza attempted service of process on the firm,[26] it would have been binding on Mr. Eyre, giving him notice that he was being compelled to testify at trial. Had he failed to appear, PRA's evidence absolutely would have been excluded (because it would be hearsay not within any exception, and because it would not satisfy section 98(a)—the address in the declaration would be shown to be NOT an address where he was available for service), which likely would have resulted in the loss of its case.[27] Although Meza never attempted to serve process on Mr. Eyre, *see* ER 154-56, he was available for service of process within the meaning of the statute.

E. *Target v. Rocha* And *CACH LLC v. Rodgers* Do Not Apply Here

Meza hangs her hat on decisions issued by Appellate Divisions of two

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[26] Meza concedes the firm's office is less than 150 miles from the courthouse. *See* POB at 23 n.6.

[27] Though the penalty for ignoring a subpoena "may be much more serious than that for not responding to a summons," *see* POB at 27, the penalty imposed on the party whose declarant fails to appear at trial is hardly inconsequential. The declaration – which may be the only evidence proffered – is excluded. This is a far better outcome for the party against whom it was offered, and certainly more favorable than being able to cross-examine the declarant *but having the testimony and exhibits admitted into evidence nonetheless.*

California Superior Courts, *Target Nat'l Bank v. Rocha*, 216 Cal. App. 4th Supp. 1 (Santa Clara County Sup. Ct. App. Div. 2013) ("*Rocha*"), and *CACH LLC v. Rodgers*, 229 Cal. App. 4th Supp. 1 (Ventura County Sup. Ct. App. Div. 2014) ("*Rodgers*"). Neither case, of course, is binding or persuasive.[28] Both were wrongly decided, as they ignored the plain language of section 98, its legislative history, and the appropriate rules of statutory construction (as the District Court observed when finding that this Court "would not follow" their holdings, *see Meza*, 125 F. Supp. 2d at 1005).

In *Rocha*, the plaintiff filed a section 98 declaration, which the court admitted. *Rocha*, 216 Cal. App. 4th Supp. at 4. The declarant stated she was "available for service of process via Plaintiff's Counsel . . . for 20 days immediately prior to trial" at an address within 150 miles of the courthouse. *See id.* at 6. The designated address was the business address of ABC Legal Services,

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[28] *See People v. Corners*, 176 Cal. App. 3d 139, 146 (1985) (decision of appellate division of superior court not binding on another superior court or California Court of Appeal); *Dinh Ton That v. Alders Maint. Ass'n,* 206 Cal. App. 4th 1419, 1427 n.7 (2012) (decisions of appellate division "have no binding or persuasive authority"). Meza says the District Court "further concluded that the interpretation of Section 98 set forth in the *Rocha* and *Rodgers* cases **may be binding** in Santa Clara and Ventura Counties . . . ." POB at 16 (emphasis added), citing ER Vol. 2 585:11-19. This is not accurate. What the District Court actually said was "even if *Rodgers* and *Rocha* are precedential within their respective counties," neither case applied to Respondents' lawsuit against Meza "in San Mateo County Superior Court."

not the address of plaintiff's counsel. *See id.*

Rocha's counsel had a process server make two attempts to serve the declarant personally with "a civil subpoena for personal appearance at trial or hearing" at ABC Legal Services. *Id.* An employee informed the process server the declarant was not there, "but that he could accept service on her behalf. . . . As the process server was only authorized to personally serve [the declarant], he left without serving the subpoena." *Id.*

Incorrectly describing the issue as "a matter of first impression,"[29] the Appellate Division of the Santa Clara County Superior Court concluded the declaration did not satisfy section 98, because the declarant "was not available for service of process within 150 miles of the courthouse." *Id.* at 6, 9. The court observed that section 98 "implicitly recognizes the opposing party's right of cross-examination," and therefore "a party may only introduce a witness's declaration if the opposing party had the opportunity to cross examine the witness at deposition or could require the witness to be subject to cross-examination at trial." *Id.* at 7. The court agreed with Rocha "that Section 98 contemplates service of a civil subpoena for personal appearance at trial." *Id.*

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[29] In fact, this was not a matter of first impression, as that same Appellate Division had considered the issue three years earlier, and had come to the opposite conclusion. *See* ER 198-94 at ¶ 8 & 220-43.

Despite the prohibition against re-inserting language that had been rejected by the Legislature, the *Rocha* court actually relied on the fact that "a previous draft version of Section 98 required the affiant to provide his or her current address and be 'subject to subpoena for the trial'" to support its conclusion. *Id.* (quoting Assem. Bill No. 3170 (1981-1982 Reg. Sess.) as introduced Mar. 10, 1982). The court noted that although "the Legislature has provided many different modes of serving summons, only one mode, personal delivery is available for serving a subpoena," citing section 1987(a) of the Code of Civil Procedure. *Id.*

The following year, the *Rodgers* court found *Rocha's* logic "persuasive." *Rodgers*, 229 Cal. App. 4th Supp. at 7. There, the section 98 declarant was located in Colorado, but had authorized service of process at plaintiff's counsel's office "within a reasonable period of time prior to trial in order to allow for necessary travel." *Id.* at 3. The court agreed with *Rocha* "that merely providing an address within 150 miles of the location of the trial is insufficient to effectuate service of a subpoena." *Id.* at 6. Unlike *Rocha*, however, when Rodgers tried to serve the declarant at counsel's office, service was refused.[30] The court strongly

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[30] The court observed: "The record in this case indicates that [the declarant] was **not** available for service of process at the address specified by Respondent. This is evidenced by the fact that no one at the specified address was instructed to

suggested the result would have been different had the efforts to serve the declarant not been thwarted.[31]

In addition to being wrongly decided, both cases are also distinguishable on their facts. Here, in stark contrast to the litigants in *Rocha* and *Rodgers*, Meza admittedly made no effort to compel Mr. Eyre's attendance at trial. *See* ER 154-56. Had she wanted to cross-examine him, she only needed to serve process at

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make him, 'available for service' within the 20 days before trial upon request. If the address specified for service of [the declarant] was indeed the law offices of Mandarich LLC, **someone at the office could have accepted the subpoena on his behalf** and requested his appearance consistent with his declaration that he would accept it at that location and make himself available for trial. Instead attempts by Appellant to secure his attendance at trial were refused." *Id.* (first emphasis in original; latter emphasis added).

[31] The court stated: "We perceive the necessity of proceeding to trial in cases of this nature by way of declaration as opposed to live witnesses. In the vast majority of cases, where the matters are uncontested or otherwise unchallenged, section 98 makes perfect sense. However, when documentation is challenged in the trial court and plausible arguments are made concerning the authenticity or accuracy of the underlying declarations or documents, **and where a litigant has made good faith efforts to compel the declarant's testimony at trial**, the litigant should be allowed to cross-examine the declarant. The spirit of section 98 was most certainly not to deprive litigants of the right of cross-examination. Although requiring personal service, or having a local declarant literally available for service within 150 miles, is unwieldy in cases of this nature, in a contested matter, **where the litigant has made efforts to effectuate service**, the right of cross-examination at trial should prevail over the convenience of the litigants and the witnesses." *Id.* at 6-7 (emphasis added; citations omitted).

PRA's lawyer's office, which is indisputably within 150 miles of the courthouse.[32] Unlike the debtors in *Rocha* and *Rodgers*, Meza did not attempt to bring the declarant to trial by any method. She thus voluntarily waived her "opportunity to cross-examine the witness." *Rocha*, 216 Cal. App. 4th Supp. at 7. Neither *Rocha* nor *Rodgers* support Meza.

F. Meza's Proposed Interpretation Of The FDCPA Raises Serious Constitutional Issues And Therefore Must Be Rejected

1. Respondents Have A First Amendment Right To Petition The Courts

Meza's true motive emerges later in her brief. She seeks to gut the constitutional right to petition of a particular set of litigants–debt purchasers–by eliminating their right to employ the pretrial procedures available to all other litigants. Meza's desired outcome hinges on her claim "that the First Amendment does not explicitly guarantee a right to use the courts for collection of defaulted

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[32] Or, because Mr. Eyre resides in California, *see* ER 554 at ¶ 3, she could have served a Notice to Appear pursuant to section 1987(b) of the California Code of Civil Procedure. Meza argues that out-of-state witnesses and witnesses not subject to attendance under section 1987 of the Code of Civil Procedure cannot be *compelled* to attend trial, even if the witness *has* appointed someone to accept service of process. Even if she is correct (and she is not), section 98 has a built-in penalty: if the declarant does not appear for trial, then the plaintiff automatically has its evidence excluded, a far better result for the defendant than being able to cross-examine the declarant. If no witness appears after being noticed, the declaration is shown not to comply with section 98, because the address provided is proved not to be where the witness is available.

consumer debt." POB at 35. She is flatly wrong on this point.

The First Amendment to the United States Constitution protects the right "to petition the Government for a redress of grievances," by prohibiting Congress from "abridging" that right. U.S. Const. amend. I; *see also id.* amend. VII (preserving right to jury trial for common-laws suits where amount in controversy exceeds $20). In what later became known as the *Noerr-Pennington* doctrine, the Supreme Court interpreted the First Amendment as prohibiting Congress from enacting laws that would impose statutory tort liability based on acts taken in furtherance of the right to petition the government. *See Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 1227 (1961); *United Mine Workers v. Pennington*, 381 U.S. 657 (1965); *see also Sosa v. DIRECTV, Inc.*, 473 F.3d 923, 929 (9th Cir. 2006) (explaining that under *Noerr-Pennington* doctrine, "those who petition any department of the government for redress are generally immune from statutory liability for their petitioning conduct"). The Supreme Court has held that the First Amendment also bars state legislatures from enacting laws that would impose liability based on petitioning activity. *See Edwards v. South Carolina*, 372 U.S. 229, 235-37 (1963) (applying

First Amendment to states through Fourteenth Amendment).[33]

California courts have recognized that the "'*Noerr-Pennington* doctrine is a broad rule of statutory construction, under which laws are construed so as to avoid burdening the constitutional right to petition.'" *Vargas v. City of Salinas*, 200 Cal. App. 4th 1331, 1343 (2011) (quoted citation omitted). "The doctrine has since been extended to virtually all civil liability for legitimate petitioning activity." *Id.*[34]

It cannot be questioned that the First Amendment right of petition extends to court access. *See, e.g., BE & K Constr. Co. v. NLRB*, 536 U.S. 516, 525 (2002) ("[t]he right of access to the courts is . . . but one aspect of the right of petition"). Thus, filing a lawsuit to collect an unpaid financial obligation unquestionably invokes the First Amendment right of petition. *See Yu v. Signet Bank/Virginia*, 103 Cal. App. 4th 298, 316 (2002); *see also Mello v. Great Seneca Fin. Corp.*,

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[33] Meza sought to hold Respondents liable for violating the FDCPA, based on allegedly having violated section 98. If Meza's interpretation of section 98 is adopted, the Ninth Circuit might conclude that Respondents violated the FDCPA. In that event, Congress would have "abridged" Respondents' First Amendment right of petition by subjecting them to FDCPA liability as a direct result of their petitioning activity.

[34] As this Court observed in *Pacific Gas & Elec. Co. v. Bear Stearns & Co.*, 60 Cal. 3d 1118, 1135 (1990), the *Noerr-Pennington* jurisprudence "protect[s] the *litigant* from liability for undertaking to bring a colorable claim to court."

526 F. Supp. 2d 1024, 1029 (C.D. Cal. 2007) (filing state-court collection lawsuit was act in furtherance of right of free speech under United States or California Constitution).

Meza's proposed interpretation of section 98 would effectively prohibit creditors whose witnesses reside more than 150 miles from the court, or outside California, from using section 98 declarations.[35] If adopted, her reading of the statute would strip those creditors of the rights Meza and others like her have under section 98.[36]

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[35] *See* POB at 35. ("Respondents, knowing that Mr. Eyre did not reside or work within 150 miles of the place of trial, could have eschewed serving the offending declaration and simply chosen to bring Mr. Eyre to trial to testify.").

[36] Meza's interpretation would impact not just creditors. It would prevent all types of litigants from utilizing section 98 in the same manner as Respondents. It would also apply to both plaintiffs and defendants. Thus, Meza could have invoked section 98 to defend against Respondents' lawsuit. If, for example, Meza contended that a former spouse or other family member, who now resides outside California, was liable for the obligation, she could have offered that person's affidavit in lieu of live testimony. Under her interpretation, however, Meza would have to arrange for her witness to be present within 150 miles of the courthouse for twenty days before trial. Meza also argues that Respondents should not have "a litigation advantage over other out-of-state litigants who follow the law" simply because they "file cases in bulk." POB at 36. This argument is misguided, in at least two ways. First, if Respondents' interpretation of section 98 is correct, then all litigants – regardless where their witnesses are located – will have the same "litigation advantage." Second, if Meza's interpretation of section 98 is correct, then "out-of-state litigants" will be disadvantaged vis-a-vis in-state litigants. Nothing in section 98 or its legislative history to suggest that the Legislature sought to discriminate in favor of in-state litigants or against out-of-state litigants.

Meza's interpretation of section 98 would also expose collectors who serve section 98 declarations that designate local agents for service of process to FDCPA liability, simply because they exercised their constitutional right of petition. *See* 15 U.S.C. § 1692k(a) (authorizing recovery of damages and attorneys' fees). Meza's reading of section 98 would improperly restrain the petitioning activity of out-of-state creditors.

2. Meza's Cost-Related Arguments Are Unavailing

Meza argues that Respondents are only interested in "cheap trials by declaration" and suggests that the Court can put an end to their "'coveyor belt' collection litigation" by agreeing with her interpretation of section 98. POB at 34-35. In Meza's view, "Respondents' real aim is merely to continue avoiding the true cost of litigation," and that Respondents should pay for their litigation if they are going to litigate. Her argument ignores the fact that the significant additional filing fees for summary judgment motions – her suggested alternative – will, if the motions are granted, be added onto the judgments against the consumers.[37] The Legislature sought to avoid increased costs when it enacted section 98. Meza's suggestion is certainly not consumer friendly.

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[37] This does not include any post-judgment interest, which accrues at ten percent per year. *See* Cal. Code Civ. Proc. § 685.010(a).

Alternatively, Meza proposes that Respondents should simply bring their witnesses to trial to testify. Again, she ignores the fact that consumers who lose at trial will be liable for the travel costs incurred by those distant witness.[38]

Meza's recommended approaches would subject unsuccessful consumers to liability for significant additional costs. Respondents' approach, in contrast, imposes zero risk that consumers will be liable for any additional expenses. A consumer who serves a section 98 declarant with a request to appear at trial, care of the plaintiff's attorney, incurs no cost (beyond the cost of a first-class stamp, perhaps). Meza points to no evidence in the record that, in cases where the declarant's presence was requested, Respondents ever sought to recover any witness or mileage fee from the consumer. Regardless, under Meza's interpretation of section 98, the consumer's exposure to costs would be even higher, because the out of state financial institution would need to incur additional costs associated with locating the witness near the courthouse for a twenty-day period prior to trial.

Meza also suggests that Respondents could simply sue in a court "where

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[38] Costs are allowable if they are "reasonably necessary to the conduct of the litigation" and "reasonable in amount." Cal. Code Civ. Proc. § 1033.5(c). Witness fees and expenses are recoverable under section 1033.5(a) of the Code of Civil Procedure. *See National Secretarial Serv., Inc. v. Forehlich*, 210 Cal. App. 3d 510, 524, modified (June 13, 1989).

their affiant had an address within 150 miles of the place of trial." POB at 36. This ignores the fact, however, that the venue for a debt collector's suit is dictated by the consumer's location, not the affiant's location.[39] Meza also ignores the impracticality of her argument: it would require the collector – or any other plaintiff – to ensure that it employed an affiant who worked or resided within 150 miles of every courthouse in California where suit might be filed.[40] Of course, nothing in section 98 says that.

If Meza is correct, a party whose affiant resides outside California would incur significant additional cost to house the witness within 150 miles of the courthouse for a reasonable period of time for the twenty days prior to trial, exposing their adversary to significant additional costs. This is completely at odds with the purpose of section 98, which was to minimize the costs associated with prosecuting and defending small-stakes cases.

But in fact, rejecting Meza's interpretation of section 98 will provide

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[39] Under the FDCPA, a debt collector must file suit "in the judicial district . . . (A) in which the consumer signed the contract sued upon; or (B) in which such consumer resides at the commencement of the action." 15 U.S.C. 1692i.

[40] Under Meza's view, it is not enough for the affiant to live or work within 150 miles of the court. The affiant must also live in California, because, as she acknowledges, subpoenas are not enforceable outside California. Though an affiant who resides in, for example, Reno, Nevada may be within 150 miles of the courthouse in Truckee, California, that person would not be subject to a subpoena.

consumers all of that relief that she purports to seek. Serving a notice to appear by mail, fax, or email is sufficient to compel the declarant's attendance–and if that declarant does not appear, then the testimony and exhibits are inadmissible.

IV. CONCLUSION

Respondents respectfully submit that this Court should not follow the non-binding and wrongly decided *Rocha* and *Rodgers* decisions, and should instead follow the plain language and legislative history of section 98. Respondents respectfully request that the question certified by the United States Court of Appeals for the Ninth Circuit to this Court be answered in the negative.

SIMMONDS & NARITA LLP

Dated: December 19, 2017

By: _____
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CERTIFICATE OF WORD COUNT

Pursuant to California Rule of Court 8.520(c)(1), I certify that the text of this brief consists of 10,197 words, exclusive of the certificates, tables , cover, and signature blocks, according to the word count of WordPerfect, the computer program used to prepare this brief.

SIMMONDS & NARITA LLP

Dated: December 19, 2017

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PROOF OF SERVICE

I, Rosana M. Klingerman, declare that:

I am employed in the City and County of San Francisco, California. I am over the age of eighteen years and not a party to this action. My business address is 44 Montgomery Street, Suite 3010, San Francisco, California 94104-4816.

On this date, I served the following documents from San Francisco, California in the manner listed:

via overnight delivery, addressed as follows:

Original and ~~one copy~~ eight copies to:

Supreme Court of California
350 McAllister Street
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Supreme Court

and via first-class mail, addressed as follows:

One copy each to:

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U.S. Court of Appeals
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Court of Appeals

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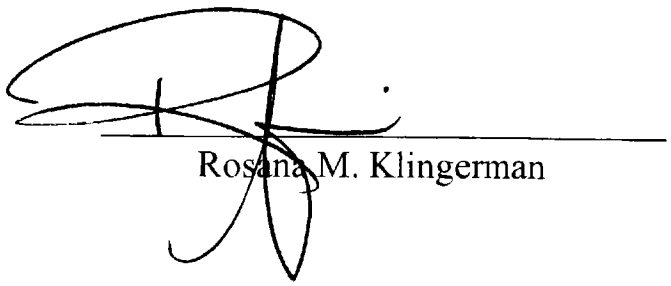
I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed at San Francisco, California on this 21st day of December, 2017.



Rosana M. Klingerman